

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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May 17, 2004

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Counsel for Debtors
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Bruce J. Gering,
Assistant United States Trustee
230 South Phillips Avenue, Suite 502
Sioux Falls, South Dakota 57102

Lee Ann Pierce,
Chapter 7 Trustee
Post Office Box 524
Brookings, South Dakota 57006

Subject: *In re Danny C. and Marla J. Wolff,*
Chapter 7; Bankr. No. 03-40853

Dear Counsel and Trustees:

The matter before the Court is the Rule 2016(a) Application for Compensation and Reimbursement filed by John E. Harmelink, counsel for Debtors, and the objection thereto filed by the United States Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below Attorney Harmelink will be allowed an administrative expense of \$504.31, and he must refund to Debtors \$89.16 for an overpayment of post-petition fees.

Summary. Danny C. and Marla J. Wolff ("Debtors") filed a Chapter 7 petition in bankruptcy on July 11, 2003. John E. Harmelink served as their bankruptcy attorney. Attorney Harmelink filed a disclosure of compensation saying he had agreed to represent Debtors for \$1,150, including the filing fee. He stated in his disclosure that Debtors had paid him \$300 and that he was still owed \$850. The disclosure further

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stated:

Balance due fully payable from refund due debtors from Nationwide Asset Service, Inc. If refund is not received by July 20, 2003, Debtors will pay \$450.00 on July 20, 2003 and \$100.00 each month thereafter until account balance is fully paid[.]

Attorney Harmelink received additional funds from Debtors post-petition, apparently reflecting the additional sums Debtors had agreed to pay him as stated in his disclosure of compensation.¹ According to his fee application, he received \$500 on August 18, 2003, and \$100 on September 3, 2003, October 13, 2003, and January 20, 2004, for a total of \$800. Attorney Harmelink also wrote off \$647 on November 30, 2003, to reflect "agreed Retainer through 1st Mtg Creditors."

Attorney Harmelink filed a Rule 2016(a) Application for Compensation and Reimbursement on February 23, 2004. According to his calculations, Attorney Harmelink was still owed \$415.05, which he apparently wanted to be paid either from the bankruptcy estate or by Debtors.

The United States Trustee filed an objection on March 12, 2004. He calculated that allowed fees from the estate totaled \$1,457.28. When the \$300 retainer and \$647 write-down were applied, he calculated that the unpaid administrative expense for these allowed fees was \$510.28. For the post-petition services that benefitted only Debtors and had to be paid by them directly, the United States Trustee calculated the compensation and reimbursement totaled \$707.77. The issue the United States Trustee presented to the Court was whether Debtors' post-

¹ Whenever an attorney's fee arrangement with a debtor changes, a supplemental disclosures of compensation must be filed pursuant to 11 U.S.C. § 329(a), Fed.R.Bankr.P. 2016(b), and Local Bankr. R. 2016-1(a); see *Schroeder v. Rouse (In re Redding)*, 263 B.R. 874, 878-80 (B.A.P. 8th Cir. 2001)(court may disgorge fees that an attorney fails to specifically disclose). The disclosure must be made regardless of the source of the fees. *Redding*, 263 B.R. at 878.

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petition payments of \$800 should be applied to the balance owed by the estate or the balance owed by Debtors.

A hearing on the fee application was held April 7, 2004. At the Court's request, Attorney Harmelink filed a supplemental pleading that better explained his pre-petition fee arrangement with Debtors.

Discussion. Until recently, a Chapter 7 debtor's attorney in this District generally has been entitled to compensation from the bankruptcy estate for analyzing the debtor's financial condition, rendering advice and assistance to Debtor in determining whether to file a petition in bankruptcy; preparing the petition, the schedule of assets and liabilities, and the statement of financial affairs; and representing the debtor at the § 341 meeting of creditors. See, e.g., *In re Lorraine M. Hankins*, Bankr. No. 01-41241, slip op. at 3-6 (Bankr. D.S.D. May 9, 2003); *In re Robert L. Boeka, Jr.*, Bankr. No. 01-40301, slip op. at 2-4 (Bankr. D.S.D. July 16, 2001); *In re Dale G. and Brenda L. Hermanson*, Bankr. No. 95-40711, slip op. at 2-4 (Bankr. D.S.D. July 11, 1996); and *In re Tommy O. and Diane E. Rice*, Bankr. No. 93-40057, slip ops. (Bankr. D.S.D. Dec. 18, 1995 and August 14, 1995). As a consequence of *Lamie v. United States Trustee*, 124 S.Ct. 1023 (2004), however, a debtor's attorney can no longer be paid at all from the Chapter 7 estate for any services rendered after January 25, 2004, unless the attorney is employed by the case trustee for a specific purpose. *Lamie*, 124 S.Ct. at 1031-32; *In re Linda L. Rosenow*, Bankr. No. 99-50365, slip op. (Bankr. D.S.D. Feb. 9, 2004). In a nutshell, the Code, Federal Rules, and related case law now require that a Chapter 7 debtor's attorney's pre-petition fees should be paid in full with pre-petition funds and post-petition fees may be paid only by the debtor with non estate, usually post-petition, funds.

In this case, Attorney Harmelink's compensation for the basic Chapter 7 services discussed above, which were all rendered before the January 25, 2004, cut-off date due to *Lamie*, totaled \$1,137.15; the related expenses, including the filing fee and mileage to the § 341 meeting, totaled \$245.93; and related sales tax was \$68.23. Thus, Attorney Harmelink's fees

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for basic services through the § 341 meeting totaled \$1,451.31. When his \$300 pre-petition retainer and his \$647 write off are deducted, a balance of \$504.31 remains. This is an administrative expense that shall be paid from the bankruptcy estate to the extent funds are available. If funds are not available, the balance goes unpaid; it is not Debtor's personal obligation.

Attorney Harmelink also did substantial post-petition work for Debtors, which were all personal to Debtors. The services did not benefit the estate; thus, they are not compensable from the bankruptcy estate.² *Hankins*, slip op. at 6. Compensation for these services totaled \$606.08, sales tax on this compensation was \$36.37, and reimbursement for related expenses were \$68.39 for a total of \$710.84.

The \$800 that Debtors paid to Attorney Harmelink post-petition was not property of the estate. The apparent source of these funds was either post-petition earnings or an accounts receivable from Nationwide Asset Service, Inc., which Debtors declared exempt. Accordingly, the \$800 must be applied to Debtors' personal fee obligation to Attorney Harmelink for post-petition services. Since the \$800 in post-petition payments exceeded the \$710.84 due, Attorney Harmelink will need to refund \$89.16 to Debtors.

An appropriate order will be entered.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

² As discussed above, following the *Lamie* decision even services by a Chapter 7 debtor's attorney that benefit the estate are no longer compensable from the estate unless the attorney has been formally employed by the case trustee. *Lamie*, 124 S.Ct. at 1030-34.

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INH:sh
CC: case file (docket original; serve parties in interest)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 03-40853
) Chapter 7
DANNY C. WOLFF)
Soc. Sec. No. 400-84-8305)
)
and) ORDER RE: ALLOWANCE OF
) FEES FOR DEBTORS' COUNSEL
MARLA J. WOLFF)
Soc. Sec. No. 509-66-9615)
)
Debtors.)

In recognition of and compliance with the letter decision entered this day,

IT IS HEREBY ORDERED that John E. Harmelink, counsel for Debtors, is awarded an administrative expense claim against the Chapter 7 estate for \$504.31; and

IT IS FURTHER ORDERED that Attorney Harmelink shall refund to Debtors \$89.16 for an overpayment of post-petition fees.

So ordered this 17th day of May, 2004.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)